

circuit basis.²⁴⁴ Where safety violations are cleared from a particular circuit, either through repairs to the specifications identified by USS or by the sign-off of an Arkansas licensed professional engineer, new attachments could be made on that circuit.

116. The circuit-based moratorium was necessary and appropriate due to the pervasive nature of the violations present with respect to Complainants' facilities. As is obvious from the linear nature of the pole plant itself, each pole does not exist as an island unto itself. Rather, poles are connected and interdependent on the surrounding poles. Accordingly, where one pole in a circuit is damaged, for example, due to a vehicle hitting a low-hanging CATV cable, this can have a cascading effect on surrounding poles by physically downing or twisting them due to the cables strung between them, or causing a power disruption that can ripple through to impact all poles in a particular circuit.²⁴⁵ Danger of downed poles or cascading disruptions are particularly acute for violations involving the failure to have proper clearance and/or anchoring of the cable plant, especially during extreme loading conditions experienced during ice storms or high winds or if a cable is caught by a vehicle passing underneath.²⁴⁶ These extreme loading conditions place a strain on the electric utility fixtures (poles, guys, anchors, cross-arms, etc.). The failure of one structure can cause several more structures to fail in a "domino" fashion.²⁴⁷ Protective devices on the circuits can sectionalize electrical faults, but cannot stop physical failures. A structural failure in the first protected segment of the circuit will cause the substation protective equipment

²⁴⁴ An electrical circuit in this case is a set of poles associated with a particular transformer. A circuit may be 5 poles or a 100 poles or more depending on the configuration of the electrical grid at that particular location.

²⁴⁵ Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶ 39.

²⁴⁶ *Id.* at ¶ 59.

²⁴⁷ *Id.* at ¶ 39.

to operate, possibly causing loss of service to thousands, damage to expensive line and transformer equipment and possible outages on the transmission system.²⁴⁸

117. As a practical matter, however, the “denial of access” claim is both untimely and moot. In the first instance, the FCC’s rules require that requests for access be made in writing.²⁴⁹ Until very recently, none of the Complainants had submitted a written permit application for EAI’s evaluation.²⁵⁰ While Complainants may assert that EAI had verbally denied access through the “freeze,” the appropriate course of action would have been to submit a written request and to permit EAI the opportunity to evaluate and deny it, if appropriate. EAI has never told Complainants that permit applications would not be accepted for consideration.²⁵¹ In any event, regardless of Complainants’ failure to submit a written request, their claim now is untimely as the FCC’s rules further require that complaints for denial of access be made within 30 days of such denial.²⁵²

118. Moreover, EAI has processed the most recent applications submitted by Comcast and Alliance, despite the fact that violations still exist on poles in the circuit in which the requested poles are located.²⁵³ Contrary to Complainants’ suggestion in footnote 211, permission was not conditioned on the clean up of *all* violations on the circuit.²⁵⁴ Rather, as justified by the concerns clearly articulated above with respect to the impact certain violations have on adjacent poles, permission was conditioned on the specific clean up of poles in the immediate vicinity to the

²⁴⁸ *Id.*

²⁴⁹ 47 C.F.R. § 1.1403 (b).

²⁵⁰ Declaration of Brad Welch at ¶ 24.

²⁵¹ *Id.* at ¶ 23.

²⁵² 47 C.F.R. § 1.1404(m).

²⁵³ Declaration of Brad Welch at ¶¶ 26-31.

²⁵⁴ See Exhibits “28”, “34.”

proposed new attachments that could be impacted by new attachments made on non-compliant poles or adjacent poles. Beginning in December, 2004, EAI, through counsel, informed the Complainants that EAI had never refused to consider proper applications for new attachments made pursuant to the pole attachment agreements. Despite the allegations of Complainants that the so-called "permitting freeze" has kept them from expanding service and "left legions of Arkansas residents, who live primarily in rural areas, without access to cable broadband service".²⁵⁵ Comcast has only submitted six applications for thirteen new attachments and Alliance has only submitted one application for sixteen new attachments since December, 2004.²⁵⁶ This few number of new attachment requests hardly evidences that "legions" of Arkansas residents are supposedly being denied access to the Complainants' services.

119. Four applications for eight new attachments were received by EAI from Comcast on January 18, 2005.²⁵⁷ On February 11, 2005, EAI issued permits for each of these applications.²⁵⁸ These permits were issued on the condition that these attachments would be constructed in strict adherence with the engineering drawings submitted by Comcast and the pole attachment contract. Comcast, through its contractor, notified EAI that the attachments for two permits, Permit Nos. 302 and 303, had been completed. Comcast also informed EAI that Permit No. 304 for one attachment at 65th and Geyer Springs Road should be cancelled since the customer

²⁵⁵ See page 2 of Summary of Complaint.

²⁵⁶ Declaration of Brad Welch at ¶ 25.

²⁵⁷ See letter written on behalf of Marc Billingsley to Brad Welch dated January 13, 2005, and received January 18, 2005 at Exhibit "27." This is the same form letter which was received from Bennett Hooks with the application for new attachments sent by Alliance; Declaration of Brad Welch at ¶ 26.

²⁵⁸ See letter from Brad Welch to Marc Billingsley dated February 11, 2005, Exhibit "28."

obtained service from another provider.²⁵⁹ This customer has informed USS that they inquired about internet service from Comcast back in May, 2004, but had decided to obtain service from a local internet provider for the reason that the service cost significantly less than what Comcast would charge for the same service.²⁶⁰ This customer has had service with the local internet provider since June, 2004.²⁶¹ Comcast submitted this application for an attachment at this location in January, 2005, when it clearly knew or should have known that there was no customer to be served at this location.

120. Permit No. 301 issued for two new attachments has yet to be completed by Comcast. EAI has required Comcast to raise its cable extending from an adjacent pole over railroad tracks in order to meet the clearance requirements of the NESC. This was required as a condition of this permit for the safety of workers who may be performing work at this pole and on the pole attachments. In a lengthy email written on behalf of Jim Davies, Comcast, and sent to Gary Bettis, EAI, Mr. Davies states that it is illegal for EAI to require corrections of NESC violations on poles adjacent to the pole where a new attachment is to be constructed.²⁶² EAI submits that it is justified to require corrections of any NESC violations found on adjacent poles as safety of workers and reliability of electric service may dictate.

121. Although Mr. Davies states that if Comcast raises its drop this would cause its drop to be above EAI's neutral in violation of the NESC, EAI raised its neutral wire to obtain the proper NESC clearance. This clearance violation caused by Comcast's low-hanging drop was remedied

²⁵⁹ See letter from James Peacock, Utility Consultants, Inc., to Brad Welch dated March 8, 2005, Exhibit "29."

²⁶⁰ Declaration of Brad Welch at ¶ 26.

²⁶¹ *Id.* at ¶ 26.

²⁶² See email message from Jim Davies to Gary Bettis dated March 4, 2005, Exhibit "30."

by Comcast setting its own pole, rather than incurring the additional time and expense of replacing the existing pole. This action was taken by Comcast at the suggestion of Gary Bettis, EAI, during a field visit on March 10, 2005, with Marc Billingsley, Comcast.²⁶³ Mr. Bettis advised Marc Billingsley, Comcast, that this work could be completed concurrently with the attachment construction so as not to delay service to the customer.²⁶⁴ In other words, obtaining proper clearance over the railroad track was not made a condition precedent to extend service to this customer.

122. Comcast has now informed EAI that this customer has a "dish" in the yard and may not require service from Comcast. Certainly, if in fact, the customer no longer desires service from Comcast, it is through no fault or delay of EAI in approving this permit. Rather, the fault is Comcast's, due to its continued refusal to timely correct NESC clearance violations. Also, with respect to Permit No. 301, in his email Mr. Davies erroneously stated that EAI required Comcast to contact SBC to have SBC move a drop on the pole as a condition of this permit. However, as stated by Gary Bettis in his email response to Mr. Davies dated March 18, 2005, although SBC does need to raise the drop, this was not made a precondition for this permit so as not to delay Comcast in making these attachments.²⁶⁵

123. Mr. Davies, in the email written on his behalf, also questioned why USS does not notify other licensees of make-ready work required by Comcast. In response, Gary Bettis, EAI, advised Mr. Davies that if USS contacts Comcast for necessary make-ready work on behalf of other licensees, the licensee has paid USS to do so. USS is not otherwise obligated to contact other

²⁶³ Declaration of Brad Welch at ¶ 28.

²⁶⁴ *Id.*

²⁶⁵ See email response from Gary Bettis to Jim Davis dated March 18, 2005, Exhibit "31."

licensees on behalf of Comcast for make-ready work to be performed to allow Comcast to attach to EAI poles. For instance, with respect to the Cebbridge project noted in Mr. Davies email, Cebbridge has paid USS to perform pre-and post-inspections and to contact other licensees for necessary make-ready work associated with this project. Certainly, if Comcast desires, it also can retain USS for these purposes.

124. The email written for Mr. Davies also states that Comcast is required to submit detailed engineering drawings with applications for permits, whereas other licensees are not required to take this step. However, each licensee attaching to EAI poles is treated equally for permitting purposes. EAI requires all of them to follow the terms and conditions of the pole attachment agreements.²⁶⁶ The facts are that Comcast has been unwilling and has failed to follow the permitting process until now and remains defiant toward correcting safety violations which pose safety and reliability risks every step of the way. This behavior should not be condoned by the FCC.

125. Comcast also submitted two applications for permits, Permit Nos. 305 and 306. Permit No. 305 is for two new attachments and Permit No. 306 is for three new attachments. These applications were received by EAI from Comcast on February 28, 2005.²⁶⁷ Permit No. 305 has been approved for construction. Permit No. 306 has been approved on the condition that prior to construction of the attachment, Comcast must resubmit engineering drawings to reflect correct measurements for the attachment pole, as Comcast's contractor *incorrectly measured the neutral*

²⁶⁶ Declaration of Brad Welch at ¶ 26.

²⁶⁷ Declaration of Brad Welch at ¶ 30.

wire at this pole. The neutral wire is in fact approximately six feet lower than shown on the application submitted by Comcast for these attachments.²⁶⁸

126. Since December, 2004, Alliance has submitted one application for sixteen attachments. This application was received by EAI on December 21, 2004.²⁶⁹ It did not contain complete information necessary for proper consideration by EAI (*i.e.*, EAI's and other attachees' position on the pole, pole size and class, make-ready work, type and size of conductor and Exhibit "A").²⁷⁰ On January 19, 2005, Alliance sent EAI revised plans and the necessary information for proper consideration of this application. On February 11, 2005, EAI issued a permit to allow attachments to be made subject to certain corrections being performed.²⁷¹ These involved corrections at the take-off pole and adjacent poles for NESC clearance violations between CATV and energized parts and NESC ground clearance violations. These violations all pose safety risks not only to workers on the poles, but the general public as well. Based on recent discussions with Bennett Hooks, Alliance is currently making these corrections and the new attachments.²⁷²

127. EAI is obligated to maintain its electrical system and facilities, at a minimum, in conformity with applicable NESC. EAI is justified and it is reasonable to condition construction of new CATV attachments upon corrections being made by the Complainants of NESC

²⁶⁸ See letter from Brad Welch to James Peacock dated March 25, 2005, attached as Exhibit "32."

²⁶⁹ Declaration of Brad Welch at ¶ 31; See letter from Bennett Hooks, Alliance to Brad Welch, EAI dated January 13, 2005, attached as Exhibit "33." This is the same form letter received by EAI with the applications submitted by Marc Billingsley on behalf of Comcast.

²⁷⁰ Declaration of Brad Welch at ¶ 31.

²⁷¹ See letter from Brad Welch, EAI, to Bennett Hooks, Alliance, dated February 11, 2005, Exhibit "34."

²⁷² Declaration of Brad Welch at ¶ 31.

violations caused by CATV on poles where attachments are being made and safety violations existing on adjacent poles which pose real safety and reliability risks to workers and the general public. These practices are reasonable and should be supported by the Commission.

D. Contrary to Allegations by Complainants, EAI's Engineering Requirements Apply to All Attachers and Have Been Consistent

128. As identified herein, EAI's engineering requirements have been consistent and have been in place since the inception of the pole attachment agreements between EAI and the individual Complainants. For instance, EAI has a pole attachment agreement dated March 3, 1980, with Riverside Cable, predecessor to Comcast, which contains substantially identical engineering design specifications as required under the current agreement.²⁷³ Complainants are only required to fix their own violations; they have not been, nor does EAI consider them responsible for, violations unrelated to their facilities. As also discussed herein, where USS has incidentally identified a violation related to EAI's facilities or the facilities of a third party, EAI or the responsible company have been required to rectify the condition. EAI has remedied its own violations under the same process offered to attachers with respect to clearing violations where they can be shown to be grandfathered or otherwise in conformance with the NESC, and EAI has procured the sign off of an Arkansas licensed professional engineer in each instance. EAI has finished repairing a substantial portion of the violations that were identified on EAI facilities over the course of the inspections in question.²⁷⁴

²⁷³ See Exhibit "72."

²⁷⁴ Declaration of David Kelley at ¶ 12.

E. EAI Has Not Discriminated in Enforcing its Safety Requirements

129. Complainants assert that EAI has discriminated against them in relation to their enforcement of safety standards as to the telephone companies present on EAI's poles. While it is certainly true that EAI has not undertaken a safety inspection with respect to the telecommunications attachments present on its poles, EAI has not had a reason to do so as it has with the Cable Operators. In particular, the telecommunications attachments on EAI's poles have not been the cause of increased electrical outages, damage reports, and trouble calls – the Cable Operators' CATV facilities have.²⁷⁵ There is no reason to conduct a safety inspection of facilities that do not demonstrate widespread safety concerns. Where the inspection of Complainants' facilities has incidentally resulted in the identification of a safety violation related to EAI's facilities or the facilities of a third party, EAI has or will require that violation to be remedied in the same manner that it is requiring the Complainants to clean up their own plant.²⁷⁶

130. EAI expects that all users attached to its poles, regardless of the nature of the facility, will adhere to the safety and engineering standards established by EAI and by the NESC. Where the extent, nature and severity of a particular attachers' safety violations warrant, EAI will pursue the appropriate course of action to require cure of such a breach of contract.

131. Where there are particular disputes as to remediation or standards and how they apply, EAI remains ready and willing to discuss them on a case-by-case basis. Complainants' denial of any responsibility, however, and their misstatements or omissions of fact serve only to obscure the serious safety issues that are at the heart of this situation. For example, the isolated incident

²⁷⁵ See Emergency Tickets at Exhibits "90-93."

²⁷⁶ Declaration of David Kelley at ¶ 12.

that Complainants recite with respect to Malvern, Arkansas²⁷⁷ omits crucial facts.²⁷⁸ In fact, the pole in question was set by EAI in anticipation of installing a three phase transformer bank and was designed and engineered accordingly. The landowner, however, then proceeded to fill in two feet of earth around the base of the pole.²⁷⁹ At installation, EAI measured according to its original engineering plan (established prior to the landowner's actions) and measured from the top down, while Cox measured from the ground up including the land-owner changed elevation, resulting in insufficient clearance between the two facilities. The easiest and least costly resolution given the equipment involved and the circumstance of the insufficient clearance was to lower the cable attachment, which could be accomplished while still maintaining ground clearance.²⁸⁰ When conveyed to Cox in precisely this manner, Cox indicated they would attempt to make the adjustment. Cox was not "assigned" responsibility as alleged, and EAI is perplexed that this specific incident is now apparently a point of contention where EAI believed a solution had been reached.²⁸¹

F. EAI Has Equitably and Reasonably Apportioned the Cost of Inspection in Good Faith and According to the Benefit Received

132. FCC precedent clearly permits charges for safety inspections occasioned by a particular party to be charged solely to that party.²⁸² Accordingly, it would have been appropriate for EAI to have charged the Cable Operators for the entire cost of the safety inspections that were necessitated by the deplorable condition of their cable plant. However, EAI recognizes that it

²⁷⁷ Complaint at ¶ 281.

²⁷⁸ Declaration of Wayne Harrell at ¶ 28.

²⁷⁹ *Id.* at ¶ 28.

²⁸⁰ *Id.* at ¶ 28.

²⁸¹ *Id.* at ¶ 28.

²⁸² CTAG, *supra*.

and the other attachers received some incidental benefit, where the inspections identified violations related to their own facilities. Accordingly, and given that the FCC has not provided any guidance on this issue, EAI determined it was appropriate to allocate a portion of the inspection costs to itself and third party attachers by tallying the total number of a particular entity's contacts on a particular circuit, and dividing that number by the total number of contacts for all licensees in the circuit plus the total number of violations of EAI and telecommunications also in the circuit.²⁸³ This allocation formula is illustrated as follows: $\text{Cable Operator's Contacts in Circuit} / \text{Total CATV Contacts in Circuit} + \text{Number of Pole Owners and Telecom Violations in Circuit}$. On average, this resulted in approximately 65% of the inspection costs being allocated to the Complainants, except for Cox which was not apportioned costs according to the allocation formula given that it has not been the subject of a safety inspection.²⁸⁴ In fact, in some instances EAI has been allocated a portion that exceeds the portion attributed to the other attaching entities.²⁸⁵ EAI believes this is an accurate reflection of the benefit received by each party and accounts on a numeric basis for the non-cable violations identified. EAI did so despite the fact that the entire cost is properly chargeable to Comcast, Alliance and WEHCO. Accordingly, the Commission should find the charges reasonable and should direct Complainants to immediately remit payment to EAI.

133. Further, in complaining that they were "over-allocated" their portion of the inspection costs, Complainants have again misstated the scope of the work performed by USS, and have

²⁸³ Declaration of David B. Inman at ¶ 32.

²⁸⁴ Declaration of David B. Inman at ¶ 33; As described *supra*, charges to Cox were related to pre-construction engineering and post-construction inspection, not a safety audit as with the other attachers.

²⁸⁵ Declaration of David B. Inman at ¶ 33.

thereby inflated the supposed benefit received by EAI and the other attachers as a result of the work performed. First, but for the violations identified in the test inspections conducted with respect to Comcast, Alliance and WEHCO, the full inspections would have never been conducted.²⁸⁶ Second, USS did *not* survey and identify pole violations for each attaching entity as alleged by Complainants. Rather, USS was instructed to address only those situations involving CATV attachments and CATV violations.²⁸⁷ Where measurements were taken, they were taken solely with respect to adjacent attachments in order to determine clearances related to the CATV attachment.²⁸⁸ This was not an audit or inspection of the entire plant (nor was it designed as a pole count) – the inspection was designed, as closely as possible, to only address the CATV plant and associated safety violations.²⁸⁹

134. Moreover, EAI does not benefit from several of the tasks USS performed that Complainants now dispute. For example, with respect to the GPS mapping that was conducted, EAI received no benefit. The data that was compiled is not compatible with current EAI mapping systems.²⁹⁰ GPS coordinates were taken solely because cable companies refused to provide strand maps, and GPS represented the most efficient and accurate way to identify for both EAI and the Cable Operator the exact location of violations that require remediation.²⁹¹ Even where maps were provided, they were inadequate or incompatible with existing EAI maps.²⁹² Moreover, Comcast *required* maps showing where their attachments had been

²⁸⁶ Declaration of David B. Inman at ¶ 7.

²⁸⁷ Declaration of David B. Inman at ¶ 13; Declaration of Wilfred Arnett at ¶ 7.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ Declaration of Tony Wagoner at ¶ 9.

²⁹¹ Declaration of Tony Wagoner at ¶ 9.

²⁹² *Id.*

identified as a pre-condition for payment of expenses related to the safety inspection, and Comcast had previously asserted to EAI that it had no maps of its facilities to provide to EAI or USS as a guideline for inspections.²⁹³

135. Similarly, the digital photographs serve no purpose other than to aid in verifying the status of the pole in question and to ensure that required fixes are completed. Moreover, the photographs often enable disputes as to a particular violations to be examined and resolved without a second trip to the pole, saving time and money. The photographs also provide a contrast to verify that corrections that are reported have in fact been done.

136. As to the attachment count, while the inspection was not designed to produce an attachment count, the numbers generated were a necessary byproduct of the inspection process.²⁹⁴ Complainants also received the benefit of the count, as EAI will not have to conduct a separate inventory of their attachments for billing purposes as it has the right to do, and as it has done in the past, under the terms of the pole attachment agreements.

G. EAI Was Reasonable in Selecting USS, and Costs Associated with the Inspection are Reasonable and in Accordance with Industry Averages, Scope of the Work Performed, and Availability of Contractors

137. Complainants claim that the overall cost for the safety inspection, as well as individual line item charges, are unreasonable and out of step with industry averages. EAI, however, is not

²⁹³ Letter from Mark Grimmett to David B. Inman (Oct. 22, 2002) Exhibit "35"; Letter from Kyle Birch to David B. Inman (Nov. 5, 2002) Exhibit "36."

²⁹⁴ Declaration of David B. Inman at ¶ 41.

required to negotiate the lowest possible fee for inspection costs.²⁹⁵ Rather, work performed should be done at a “competitive rate in consonance with the work to be done.”²⁹⁶

138. As described above, EAI initially engaged USS²⁹⁷ in December 2001 to conduct a test inspection of two randomly selected electrical circuits on which Comcast had attachments after EAI had experienced ongoing outages and heightened trouble reports related to the Cable Operators’ CATV plant. USS was selected to conduct these test inspections, and ultimately the full safety inspections of the CATV plant, based on USS’ expertise, resources, and availability to do the necessary work in Arkansas within prescribed timeframes. USS employees and engineers have an average of more than 22 years of experience and a combined total of more than 348 years of experience in the fields of utility and communications engineering, including experience with major utilities, telecommunications companies, and cable companies. USS management personnel have between 20 and 35 years of experience, including extensive experience in telecommunications engineering, construction, joint use administration, power design, and cable television design, construction and management.²⁹⁸

139. EAI followed its internal procurement procedures for hiring USS based on the size, expertise, and market availability of other potential firms in the geographic market.²⁹⁹ EAI did

²⁹⁵ *Cable Texas, Inc. v. Entergy Services, Inc.*, 14 FCC Rcd 6647, ¶ 14 (Cable Bureau 1999).

²⁹⁶ *Id.*

²⁹⁷ Complainants note that USS was also engaged to perform make-ready work that was the subject of dispute in *Knology v. Georgia Power*. What Complainants fail to note, however, is that UCI was also involved in that case, and its charges were comparable to USS’s in that instance.

²⁹⁸ Declaration of Wilfred Arnett at ¶ 6.

²⁹⁹ Declaration of David B. Inman at ¶ 12.

not simply hire the first company that came along, nor did EAI have any motivation to hire a contractor that is out of step with, or more expensive than, industry norms.

140. USS is not affiliated with EAI in any manner, and negotiations were completely arms length. Charges for the tasks undertaken by USS were initially based on rates for USS' inspection services in comparable markets in Texas and Georgia.³⁰⁰ However, EAI secured considerably lower rates and line item charges from USS based on the rates EAI was familiar with in the Arkansas area and based on its own internal engineering and design rates. For example, USS' hourly charge for a project manager in Texas is \$97.50.³⁰¹ After negotiation with EAI, USS agreed to only charge \$75 per hour for a project manager for the subject safety inspections.³⁰² In fact, Cox itself has engaged USS to perform pre- and post-construction inspections and complete make-ready work now ongoing in Jonesboro, Arkansas in connection with a total rebuild project when the electric cooperative shut down their previous construction activities due to inadequate engineering and dangerous attachment practice. On information and belief, Cox is paying approximately \$33.65 per pole for the initial inspection of its poles, and \$28.57 per pole for post-construction inspection activities.

141. At the time that USS was engaged to conduct the safety inspections of Complainants' plant, there was no other firm in EAI's opinion that was available and had enough resources, experience, and possessed the appropriate Arkansas certifications, to manage the scope of work

³⁰⁰ Declaration of Wilfred Arnett at ¶ 10.

³⁰¹ Declaration of Wilfred Arnett at ¶ 10.

³⁰² *Id.*

required.³⁰³ Accordingly, comparisons to other firms, such as UCI, that were unavailable or *otherwise incapable of doing the work are false comparisons at best.* Regardless, an evaluation of comparable firms in other areas illustrates the reasonableness of the hourly charges, overhead charges, equipment charges and other fee components that make up the total expense related to the safety inspections. As illustrated in Attachment A to the Declaration of Wilfred Arnett, a survey of 27 comparable engineering firms shows that the hourly rates charged by USS for various levels of employees fall squarely within the industry norm for work of this nature, and in most instances they fall below the average.³⁰⁴ For example, where comparable firms charge an average of \$54.74 per hour for a project supervisor's time, under its contract with EAI, USS charges \$34.50 per hour. Whereas comparable firms on average charge \$97.14 per hour for a professional engineer's services, USS charges only \$80 under the EAI agreement.³⁰⁵

142. While EAI is unaware of the specific billing arrangements between Complainants and UCI, Complainants tout UCI's "less expensive" charges as reasonable alternatives to USS' rates.³⁰⁶ In comparable markets, however, where both USS and UCI have service contracts, both firms charge similar component rates.³⁰⁷ For example, while "per pole" pricing is easily

³⁰³ Note, for example, that most of USS employees are retired SBC employees with substantial experience in electrical safety and construction issues, with an average of approximately 22 years experience in the field.

³⁰⁴ Declaration of Wilfred Arnett at ¶ 13, Attachment A. Firms evaluated included, among others, Geomasters (www.floridageomatics.com); Byers Engineering Company (www.byers.com); MP NexLevel, LLC (www.mp-utilities.com); NESI, Inc. (www.nesi-fla.com); Consul-Tech (www.cte.com); CommTech Industries (www.commtech.com); Sunbelt Telecommunications, Inc. (www.sunbelt.com); Outsource Consulting Services, Inc. (www.outsource.com); Technical Development Corporation (www.tdccorp.org); and Paradigm Associates (www.paradigm-associates.com) (all sites last visited Mar. 17, 2005).

³⁰⁵ Id at 13.

³⁰⁶ Complaint at ¶ 248.

³⁰⁷ Declaration of Wilfred Arnett at ¶ 14.

manipulated depending on the components that are included in such a calculation (*i.e.*, number of poles, hourly charges, equipment rental),³⁰⁸ it bears note that in the *Knology* dispute that Complainants cite per pole charges by UCI totaled more than \$1,387,176 for post construction inspection of 19,653 poles – which is approximately \$70.58 per pole – less than the total charge for USS’ services, and far less than Complainants’ allocated share in this instance.³⁰⁹ Moreover, on information and belief, UCI was neither licensed in Arkansas nor available to conduct the inspection work undertaken by USS during the relevant time frames, and Complainants have not identified another contractor that possessed the requisite training and had the availability to perform the needed inspections in a timely fashion.

143. Furthermore, EAI has literally provided boxes full of detailed back up information related to its billing for inspection costs to each of the Complainants.³¹⁰ Where they have identified errors in billing, EAI has been willing to address them, and has corrected and reduced bills in the past.³¹¹

³⁰⁸ EAI notes, for example, that while Complainants appear to have “mismatched” their calculations by dividing the total charges for all poles inspected, including those that were inspected due to the lack of attachment maps from the cable companies, by a discounted number of poles according to the number of poles to which they believe they are attached.

³⁰⁹ *Knology v. Georgia Power*, PA 01-006. By way of further comparison, EAI notes that these charges were for a project conducted from 1998-2000; adjusting costs to present day using the Bureau of Labor Statistics SIC series ID CCU212000000600P Sector Private Industry 100-499 employees, this equates to approximately \$91.41 at today’s costs.

³¹⁰ Declaration of David B. Inman at ¶ 12.

³¹¹ For example, the Complainants cite several isolated incidents where mileage charges for a particular employee do not match with time worked during a particular week. This discrepancy, however, was due to improperly input time by the employee. The work conducted that week corresponding to the mileage charged – 34 hours in connection with the Plumerville inspection – was actually never billed to Alliance. See Declaration of Wilfred Arnett at ¶ 21.

1. Charges for Training Sessions and Billing Disputes

144. As noted by Complainants, the parties have met to discuss engineering and billing issues. In most instances, billing was a very small portion of the discussion, however, and Complainants were advised in advance that USS would bill for time incurred. Nevertheless, Complainants requested such meetings, and USS and EAI accommodated them.³¹² Mileage for travel was charged according to industry standard, as described below, where personnel were required to travel an extensive amount to meet Complainants' requests. More specific billing disputes were addressed through correspondence with EAI and billing back-up documents provided to Complainants.³¹³

145. As for "training sessions," these were often requested by the Cable Operators to address deficiencies in their crews' training.³¹⁴ Such training is also valuable in establishing a mutual understanding as to the standards, work product requirements, and scheduling needs of both parties. Further, on information and belief, as a matter of general practice Complainants often employ multiple contractors and subcontractors to conduct field work, the quality of which may vary widely from company to company.³¹⁵ In this respect, as USS had been involved with the project from its inception, it was necessary to approve new contractors and participants on the work involved.

³¹² Declaration of David B. Inman at ¶¶ 9, 28.

³¹³ Declaration of David B. Inman at ¶ 30.

³¹⁴ Declaration of Tony Wagener at ¶ 14.

³¹⁵ Many contractors also receive no training as to what is expected of them. See Declaration of Brent Lewis at ¶ 5.

2. Charges for "Duplicative Work"

146. Complainants' argument in this respect is no more than a restatement of a peripheral holding in the FCC's decision in *Cavalier Telephone, LLC v. Virginia Electric and Power Co.* and the vague and unsupported assertion EAI billed them for inspections that were flawed or defective.³¹⁶ They offer no specific instances that they dispute, nor do they offer any bills supporting their claims. Rather, where EAI and USS are aware of situations where unnecessary work may have been performed in error, Complainants have not been billed for such charges.³¹⁷

3. Equipment Charges

147. Use of the equipment, *e.g.*, GPS, digital cameras and radios, was necessary and appropriate, particularly given that the cable operators declined to provide EAI or USS with maps of their cable systems. These items and the data collected provide no benefit to EAI, as GPS is not compatible with EAI's internal mapping systems, and EAI has no need for digital photographs of its own facilities, which are coded and tracked in a database with information on initial installation dates and subsequent modifications.³¹⁸ As for the Complainants, however, GPS allows them to pinpoint precisely the pole under consideration when a violation is noted, and digital cameras provide a precise and accurate record of the violation at that point in time in order to facilitate dispute resolution and assist with quality control of inspectors. Both tools also speed post-correction inspections, saving the Cable Operators time and money. Radios similarly facilitate quick operation and speed field inspections, and address any emergency situations.

³¹⁶ Complaint at ¶¶ 342-343.

³¹⁷ Declaration of Tony Wagoner at ¶ 39. See also, Section V.H., *infra*.

³¹⁸ Declaration of Tony Wagoner at ¶ 9.

Equipment charges are standard in the industry, and are a small portion of the fees charged.

*Relative to the benefit provided to the Complainants, the equipment fees are minimal.*³¹⁹

148. All told, costs for digital cameras amounted to \$0.16 per pole (0.81 % of charges), the radio costs were \$0.12 per pole (0.5% of charges), and costs for GPS were \$0.16 per pole (0.81% of charges). For Comcast, this amounted to \$10,899.01 for cameras, \$10,893.83 for GPS units, and \$8,920.33 for radios, for a total of 2.23% of the total project charges – far from the “significant portion” of inspection costs as alleged by Complainants.³²⁰

4. Mileage Charges and Per Diem

149. Engineering consulting is often a regional practice, as firms typically are familiar with and develop an expertise in a particular geographic area. Demand for such service is also generally fairly high, and inspection personnel often traveled considerable distances to cross states to perform work for a week at a time. Mileage charges were charged at the IRS standard rate, and were calculated to the reporting location, from the reporting location to the specific job site (if in excess of 75 miles), and from pole to pole.³²¹ Mileage for return trips at the end of a particular week were not charged to any party, but absorbed by USS as a part of doing business.³²²

³¹⁹ Declaration of Tony Wagoner at ¶ 7-10.

³²⁰ Declaration of David B. Inman at ¶ 26; Complaint at ¶ 344.

³²¹ Declaration of Tony Wagoner at ¶ 15; Declaration of Wilfred Arnett at ¶¶ 20-22.

³²² Complainants cite a single bill for 505 miles to which they object. The employee in question was required for a specific project, and was required to commute to Little Rock from Villa Rica, Georgia for the week. On another occasion, mileage was charged for a project manager who was required to commute from Dallas, Texas. Complainants' calculations alleging over-charges at 111-112 miles for every mile of pole plant inspected fails to account for commuting situations

150. To EAI's knowledge and in USS's experience, it is standard utility industry practice to pay for expenses incurred by contract employees when working away from their normal work location.³²³ For most contracts, this is generally where travel required was over 50 miles, at which point contractors would be paid actual expenses for equipment and employees or on a per diem rate. This is standard in most utility type of agreements and is necessary to allow contractors to cover costs for storms or other work outside their normal work location.³²⁴ This includes, for example, where utilities participate in a regional or other consortia to provide additional crews to restore electric service after severe weather incidents such as hurricanes and tornadoes.³²⁵ To EAI's knowledge, this practice is consistent with the practices of many large electric utilities and many smaller electric cooperatives and their contractors. To EAI's and USS's knowledge and belief, UCI also charges for mileage, lodging and related expenses.

H. EAI Used Reasonable Oversight to Ensure the Accuracy of USS's Work Product and Billing Practices

151. EAI periodically reviewed and audited USS' work to ensure that billing was accurate and reflected work that was actually performed. Invoices were reviewed by EAI personnel, and where discrepancies were noted, they were resolved.³²⁶ Field reviews were also periodically conducted, with only minor discrepancies noted early in the process.³²⁷ Quality control was also

like this. Their calculation, therefore is misleading. See also, Declaration of Wilfred Arnett at ¶ 22.

³²³ Declaration of Thomas Jackson at ¶ 4.

³²⁴ Declaration of Thomas Jackson at ¶ 4.

³²⁵ Declaration of Thomas Jackson at ¶ 4.

³²⁶ Declaration of Gary Bettis at ¶ 22.

³²⁷ Declaration of Gary Bettis at ¶ 22.

Complainant to participate in the process.³⁵¹ Complainants cannot refuse participation, refuse to provide maps or counts of their own, and then claim that they were not a "participating" company under the contract. For the agency to find otherwise would fly in the face of the plain language of the contract, and would endorse self-help methods that flout contract law and accepted business practices.

158. Further, although the Cable Operators have been contractually assigned the task to maintain a perpetual inventory of their own attachments, and although they are in the best position to know the number and location of their own facilities, *none of them has provided any alternative count of their attachments*. This is despite the fact that Complainants allege that they have conducted a "re-audit" of their facilities. Accordingly, in light of their failure to offer any reasonable alternative count, the count provided by EAI should stand.

K. Charges for SBC Poles and for Poles Without Cable Attachments

1. Poles without Cable Attachments

159. USS inspected poles within each circuit where a particular cable company had attachments, which may include poles to which a Cable Operator was not attached. This was necessitated, however, by the failure of Complainants to provide adequate maps, and in some instances the failure to supply *any* maps whatsoever.³⁵² Moreover, given the extensive nature of the safety hazards uncovered and the discovery of a significant number of unauthorized attachments (including illegal attachments made to transmission facilities), even if maps had been provided, EAI would have been justified in reviewing all poles in a circuit to determine if

³⁵¹ Declaration of David B. Inman at ¶¶ 8, 18; Declaration of Michael Willems at ¶ 17.

³⁵² Declaration of Tony Wagoner at ¶ 9.

any unauthorized attachments had been made.³⁵³ Finally, where a pole did not have CATV attachments, only a minimal amount of time (a "drive by" inspection) was expended to make such a determination, and no measurements were taken.³⁵⁴ As discussed elsewhere, the inspection was designed solely to address safety issues associated with CATV attachments. The scope of the inspection, therefore, did not include measurements or other inspection activities for poles without CATV attachments. USS's inspection of these facilities, therefore, was necessitated by Complainants' own actions and lack of records, and was accordingly justified.

2. SBC vs. EAI Poles

160. USS inspected SBC-owned poles where they were part of an EAI circuit containing cable attachments. Inspections in this regard often included inspecting strand clearances at mid-span between an EAI and an SBC pole.³⁵⁵ Where at-pole clearances and safety issues were addressed for a known SBC-owned pole, inspectors focused on clearances related to the lowest EAI facility and any CATV issue that could endanger EAI's equipment.³⁵⁶ In any event, the number of SBC-owned poles that were included in the inspection was extremely small in comparison to the EAI-owned poles, as detailed in the Declaration of Wilfred Arnett, Attachment C.

³⁵³ Despite lacking CATV maps, inspectors also attempted to reasonably limit inspections within a circuit based on common sense. For example, where a circuit may have included rural areas with no residential or commercial housing developments, inspectors limited their inspection activities to those portions of a circuit in which such establishments were located and where CATV attachments would be likely. See Declaration of Tony Wagoner at ¶ 9.

³⁵⁴ Declaration of Tony Wagoner at ¶ 9.

³⁵⁵ Declaration of Wilfred Arnett at ¶ 9.

³⁵⁶ Declaration of Wilfred Arnett at ¶ 9.

L. Complainants' Cost Allocation Methods are Inappropriate and Flawed

161. Complainants suggest that the FCC should reduce the per pole charges for the safety inspection, and offer two alternate methods by which they suggest the inspections costs could be reduced. Neither theory, however, has *any* support in Commission precedent, and should therefore be rejected. Moreover, as detailed below, both contain fundamental flaws that eliminate any usefulness they may have.

1. The Competitive Rate Model

162. The "competitive rate" model suggested by Complainants is flawed and entirely unrealistic. In the first instance, it is premised on the mistaken notion that EAI was required to issue a Request for Proposal ("RFP") for the work, which was neither required by the pole attachment agreements nor warranted based on the market of potential bidders. As explained herein, USS was selected to conduct the initial test inspections for Comcast, and ultimately the full safety inspections for each company, based on USS's expertise, resources, and availability to do the necessary work in Arkansas within prescribed timeframes. Charges proposed for the tasks undertaken by USS were initially based on rates for its services in comparable markets in Texas and Georgia.³⁵⁷ However, EAI secured considerably lower rates and line item charges from USS based on the rates EAI was familiar with in the Arkansas area and based on its own internal engineering and design rates. In fact, Cox itself has engaged USS to perform pre- and post-construction inspections and complete make-ready work now ongoing in Jonesboro in connection with a total rebuild project.³⁵⁸ Moreover, as firmly established herein, including a

³⁵⁷ Declaration of Wilfred Arnett at ¶ 10.

³⁵⁸ *Id.* at ¶ 11.

hourly-rate comparison with 27 other firms, USS's rates fall well within the zone for comparable firms conducting the nature of work performed in this instance.³⁵⁹

163. EAI followed its internal procurement procedures for hiring USS based on the size, expertise, and market availability of other potential firms in the geographic market.³⁶⁰ EAI's procurement personnel reviewed the proposed engagement of USS, and determined, based on their knowledge of the market, the size of the job, and the specialized knowledge and expertise needed to conduct the project, that a RFP, as suggested by Complainants, was unnecessary and would not have been fruitful in this case.³⁶¹ EAI was not required to engage in what would have been a pointless exercise as suggested by Complainants after the fact.

164. The UCI bid offered by Complainants as the basis for its theory is also tainted, in that it was procured after the fact and with UCI's knowledge they would never have to fulfill the bid price. The "per pole" charge offered by Complainants is also drastically less than what this same firm charged for comparable work in another market, further casting doubt on the accuracy of the so-called "bid."³⁶² As also noted, this "bid" does not include use of equipment that was employed solely for the benefit of Complainants, and for which it is industry standard to charge.

165. Moreover, per pole estimates, as described above, are subject to manipulation, and based on assumptions that cannot be readily verified and which are not disclosed in this instance. For example, there is no direct comparison here for hourly rates for particular categories of engineers, or for project managers/supervisors. The "bid" also likely does not account for the

³⁵⁹ Declaration of Wilfred Arnett at Attachment A.

³⁶⁰ Declaration of David B. Inman at ¶ 12.

³⁶¹ Declaration of David B. Inman at ¶ 12.

³⁶² See, record in *Knology v. Georgia Power*, *supra*.